Supreme Court, U.S.
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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

E. O. Milton, *Petitioner*,

v.

Theodore Hullar, et. al., *Respondents*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Appearing PRO SE

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QUESTIONS PRESENTED

1. Where, pursuant to an oral agreement with a state university, a tenured professor retrains his academic competence in a new discipline, does the professor acquire a property or liberty interest in continued employment in that new discipline, such that due process guarantees in the Fourteenth Amendment to the Constitution of the United States protect him from administrative removal of his professional environment?

2. Did a court of appeal significantly depart from the accepted and usual course of judicial proceedings as indicated in Federal Rules of Civil Procedure, Rule 56, by deciding factual issues rather than remanding them to the trial court, such that Petitioner was denied due process to which he was entitled?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner E. O. Milton and the Respondents Theodore Hullar, Peter Linz, Norman Matloff, Robert Cello, Ralph Algazi, Ray Krone, Richard Walters, Manfred Ruschitzka, Carol Cartwright, Ken Joy, and Larry Vanderhoef.

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On Petition for a Writ of Certiorari to the
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for the Ninth Circuit

The petitioner E. O. Milton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the Court of Appeals (App., *infra*, 1a—8a) are unreported. The opinion of the District Court (App., *infra*, 9a) is unreported.

JURISDICTION

The Court of Appeals entered its judgment on the petition for rehearing on September 22, 1994 (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the Court of Appeals was pursuant to 28 U.S.C. §1291.

STATUTORY PROVISION INVOLVED

The jurisdiction in the District Court was under 42 U.S.C. §1983.

STATEMENT

The Petitioner E.O. Milton is a professor at a state university—the University of California, Davis—and a recipient of the Academic Senate Distinguished Teaching Award. In 1975, Milton was tenured as a professor of mathematics. In 1980, in response to a solicitation from the University Administration for faculty who would be willing to teach in a new academic program—computer science—Petitioner agreed to forego his research and instruction in mathematics and retrain his academic competency to join this new program. In exchange the University promised he would thereafter have continued employment as a tenured professor of computer science and would be entitled to a full professional environment in that field in which to pursue his academic career. The agreement was negotiated between Petitioner and the Chair of the Department of Mathematics, through which the new curriculum in computer science was to be offered. The Department Chair is appointed by and is an agent of the Chancellor, who is the chief administrative officer of the campus. The terms and conditions of the agreement are set forth in the declaration of the Mathematics Chair, the administrative officer who was in charge of the program, which is attached herewith as Appendix D (See Declaration of Carlos Borges, App., *infra*, 10a—12a).

The testimony of the Department Chair describes the arrangement:

> Professor Milton kept his promise with the Department (i.e., he retrained himself to competently teach and pursue research in computer science) and by the fall of 1982, he was teaching a full load of courses within the Mathematics Department solely devoted to computer science. His competence in this area was without question, and the Mathematics Department's obligation for its half of the bargain was also without question--namely, it was to provide him an environment

within which to proceed as a computer scientist. *What I had intended, and what Professor Milton understood, was that the Mathematics Department would provide Professor Milton from the fall of 1982 a full professional environment for computer science, including but not limited to, adequate funds for equipment; access to research assistants; access to teaching assistants; the opportunity to participate in formulating a policy for computer science; the opportunity to participate in the hiring of other computer scientists; the opportunity to participate in the formulation of course work in computer science on both the undergraduate and graduate levels; the opportunity to be evaluated by other computer scientists; and an explicit title making clear that Professor Milton's area of expertise was not simply Mathematics generally, but in computer science in particular.* (Borges Declaration, App., *infra*, at 11a) (italics added)

In reliance on this agreement, and with the knowledge and approval of the Chancellor's office, in 1981 Petitioner took a year's leave of absence at a reduced salary, studied at Stanford University, and retrained himself as a competent computer scientist. Upon returning to UC Davis in 1982, he taught courses exclusively in the computer science program that was then being offered through the Department of Mathematics. One year later, however, the Davis Administration decided to relocate the computer science courses and curricula from the Department of Mathematics to the School of Engineering. The Administration, however, did not automatically allow faculty already participating in the program to transfer with it to this new administrative house. Instead, it selectively offered that option to some and denied it to others. Though he had been a full participant in the program while it resided in the Department of Mathematics, Petitioner's request to transfer to the School of Engineering was denied by the Administration. The process by which the Administration decided who would and would not be transferred with the computer science program was conducted in a secret proceeding without records of deliberations and did not afford Petitioner the opportunity for hearing. In addition, two members of the committee that

made recommendations regarding transfers were themselves candidates for such transfer. Both were approved for transfer by the Administration, while Petitioner was not.

Since that time Petitioner has been unable to participate in the program or discipline for which he retrained. He has also been denied the right to continue teaching courses in computer science in the College of Letters and Science, to which he remains assigned. Petitioner estimates that the losses in salary alone will exceed $800,000 through age 75[1].

After unsuccessful good-faith attempts to exhaust internal remedies and remedy his situation within the university system, on October 19, 1990, Petitioner filed suit in the United States District Court for the Eastern District of California averring that by separating him from the professional environment it had promised, the UC Davis Administration had violated his civil rights under 42 U.S.C. §1983 and the Fourteenth Amendment to the United States Constitution. Specifically, Petitioner averred that the agreement the University had made with him gave rise to Constitutionally-protected property and liberty interests in his continued employment in the field of computer science and thus entitled him to a due process review before they could be extinguished.

Respondents moved for summary judgment asserting that the agreement did not implicate property or liberty interests because it did not contain an express promise to Petitioner of a transfer to the School of Engineering. Absent such a promise, it argued, Petitioner had no interest in a transfer to where the professional environment in computer science had been relocated, and absent such an interest, the procedure by which Petitioner was excluded did not have to conform to due process standards. The District Court agreed and

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[1] An exact calculation of damages will be complicated and will involve many University records. Prior to the grant of summary judgment Respondents refused Petitioner's attempts at discovery. Petitioner has arrived at the rough estimate of $800,000 by taking the most recent figures available for the roughly 33% higher salary for computer scientists and projecting them forward in time, assuming retarded advancement in Mathematics, only normal advancement in Computer Science, retirement at age 65, and 10 years past that into retirement, to age 75. The large difference in support funds would add significantly to this figure, so this is a very conservative estimate in many ways.

granted the summary judgment on that basis on January 30, 1992. Petitioner appealed to the United States Court of Appeals for the Ninth Circuit, and by a divided vote that court affirmed on the same grounds, on July 11, 1994, although it did not certify its opinion for citation.

Also by a divided vote, the Court of Appeals noted in a footnote that they believed the action to be time-barred, although this was not the basis for the decision. The majority applied a factually improper starting point and did not take into account the tolling effect of Petitioner's attempts to exhaust internal remedies. Petitioner requested a rehearing, which was also denied by a split vote on September 22, 1994.

REASONS FOR GRANTING THE PETITION

The decision on this matter by the United States Court of Appeals for the Ninth Circuit is not consonant with the two decisions of the Supreme Court of the United States that define liberty and property interests for faculty members at state institutions. The Appeals Court egregiously departed from the strict guidelines for summary judgment. The issue addressed is important for all faculty members.

I. THE DECISION OF THE COURT OF APPEALS IS IRRECONCILABLE WITH THE DECISIONS OF THE U.S. SUPREME COURT IN *BOARD OF REGENTS v. ROTH* (408 U.S. 564) AND *PERRY v. SINDERMANN* (408 U.S. 593) (1972).

In 1972 this Honorable Court addressed questions relative to employment rights of faculty in public colleges in *Board of Regents v. Roth* (408 U.S. 564) and *Perry V. Sindermann* (408 U.S. 593). In those landmark decisions, this High Court ruled, inter alia, that a tenured professor who has a Constitutionally-protected property interest in his/her continued employment and therefore any action by the state that invades that interest must afford the professor due process safeguards. (Id. at 601) The instant case presents a different question related to the same rule: i.e., does a tenured professor acquire a property or liberty interest in continued employment in a specific academic discipline, where he has retrained in that academic discipline pursuant

to an oral agreement and promise by the university of continued employment in that discipline?

In outlining the parameters for Constitutionally-protected property interests in the context of university employment, this High Court has declared:

> We have made clear in Roth, supra, at 571-572, that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." Id., at 577. *A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.* (*Perry v. Sindermann, supra*, 408 U.S. at 601). (italics added)

Thus, the essential elements for creating a property interest are (1) a benefit to be conferred, (2) mutuality in an agreement or understanding to confer such a benefit, and (3) sufficient explicitness to make clear to the parties the benefits and duties to be exchanged. Under the law applicable to the instant case, the only function of the Court of Appeals was to determine whether the party opposing summary judgment had produced credible evidence of the existence of a mutual and explicit agreement to confer a benefit so that a factual issue remained to be litigated.

But the majority of the Court of Appeals abjured this responsibility and opted for a conflicted and confusing path of factual and legal decision-making. It did not deny that, on its face, my agreement with Chair Borges was mutual, explicit, and that it conferred a benefit, but instead found as fact that "At most the oral agreement provided Milton with an expected benefit from the Mathematics Department only." (App., *infra*, 5a) . The first problem posed by this finding is that even if it were true that my only claim to a benefit lay against the Department of Mathematics, that fact alone should have been sufficient to remand this case for trial as to whether that benefit was removed in accordance with due process standards. If I had a claim of entitlement to a benefit from any agency of the University, at the very least I had a

right to be heard on that claim at a trial. The majority opinion does not explain why, in light of this finding, it affirmed summary judgment.

Neither does the majority explain what legal authority it followed when it ruled that my property interest in continued employment as a computer scientist did not survive the administrative transfer of my courses to the School of Engineering. The majority certainly did not follow the law of *Perry, supra*, which upon a showing of a mutual and explicit agreement to confer a benefit required a remand to trial to give the petitioner therein "an opportunity to prove the legitimacy of his claim of such entitlement in light of 'the policies and practices of the institution.' " (*Perry, supra*, at 603) The Court of Appeals majority simply concluded *a priori* that my entitlement to that benefit depended entirely on an express provision in the agreement that I would be guaranteed a transfer to whatever department computer science might possibly be moved to at some unknown future time. (App., *infra*, 5a) Absent such a provision, it averred that I had "no more than a unilateral expectation of a full professional environment in the Division of Computer Science" [in the School of Engineering]. (Ibid.)

By this reasoning, however, no mutual and explicit promise of a benefit would ever confer a property interest unless it also provided for every specific future condition under which it could not be revoked. For, even if I had had the shrewd foresight to insert a "relocation indemnification" clause in my agreement, relocating the courses was only one means by which the Administration could claim a right to revoke it; the Administration could have also opted to rename the program and claimed that as a legitimate basis revoking my benefit. By the principle enunciated by the Court of Appeals, I would have no protected property interest in the newly-renamed program because I had failed to foresee this contingency and insert a "name change indemnification" clause in my agreement. The possibilities are infinite.

The rationale by which the Court decided against me would require every person who enters into a good faith agreement with a university administration to also anticipate every possible means within its power by which it could claim a pretext for revoking the agreement and to insert an express disclaimer for each of them. In substance, the

decision of the Court of Appeal rewrites *Roth* and *Perry* with this new rule of law: "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing, *and provided that the understandings specifically list all possible circumstances under which the benefit cannot be revoked.*" Under such a doctrine, "property" as defined in *Perry*, would be reduced from "a broad range of interests secured by 'existing rules or understandings' " to a few narrow interests. See Perry, *infra*, at 577. To the elements of mutuality and explicitness, the Court of Appeals would add the requirement of "prescience," exhaustive prevision as to all possible means of revocation of the benefit. That principle seems to me to be irreconcilable with the prior decisions of this Honorable Court in matters of this nature.

Furthermore, if the law is as the Court of Appeals says it is, oral agreements would be meaningless as would "understandings," "usage," "practices" etc. Yet, well before *Perry* the United States Court of Appeal for the District of Columbia articulated the prevailing view that

> Contracts are written, and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is. The readings of the marketplace are not invariably apt in this non-commercial context . . . *Greene v. Howard University*, 412 F. 2d 1128, 1135 (D.C. Cir. 1969).

and three years later in *Perry* this Honorable Court specifically held that all of these are bona fide sources of agreements that can give rise to property interests:

> the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be "implied." [citations omitted] Explicit contractual provisions may be supplemented by other agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances." [citations omitted] And,

"the meaning of [the promisor's] words and acts is found by relating them to the usage of the past." (Id at 601-602)

Thus, following *Perry*, the issue that should have been presented to a trier of fact is whether the "explicit contractual provision" of the University's unrestricted promise to provide me with a full professional environment in computer science implied "other agreements" from "the promisor's words and conduct in the light of the surrounding circumstances" and past usage. That is, did the promisor's words and conduct, along with surrounding circumstances, establish an implicit agreement that by virtue of my retraining, competence, and performance, I would have a right to continued employment in a full professional environment in computer science without regard to where it might be offered or by whatever name it might be called?

Contrary to the assumption of the Court of Appeals, nothing in the agreement limited the promise of my continuing employment in computer science to its being located in the Mathematics Department, or for that matter, in any other department. The agreement was silent on this matter, as it was on any other possible means by which the benefit could be revoked. The reason these kinds of issues were never addressed was because there has always been an implicit understanding in university life that as long as a professor remains competent, he will have the right to teach and write in his field, irrespective of where he or it may be housed for administrative purposes. The essence of a university is in the substantive competence of its faculty, not in how it is organized for administrative purposes. It never occurred to me to that I could lose my right to continue teaching as a computer scientist if the program were relocated, because such an action has no bearing on my ability and competence in that field, and obviously it never occurred to Chair Borges who negotiated the agreement with me. (See Borges declaration, App., *infra*, 10a—12a).

The decision of the Court of Appeals is contradictory within itself and contradictory to the decisions in *Roth* and *Perry*. Contrary to the holding of the High Court "that 'property' interests subject to procedural due process protection are not limited by a few rigid, technical forms . . . [and that] 'property' denotes a broad range of interests that

are secured by 'existing rules or understandings' " (*Perry, supra*), the ruling of the Court of Appeals would impose a condition that would make virtually any substantive agreement made in good faith and with abundant clarity revocable by some purely formal administrative action. What the Court of Appeals decided was that my property interest did not derive from the labor of my retraining in computer science, or from the year I spent teaching computer science, or from my future scholarly productivity in computer science. The Court of Appeals ruled that my property interest inhered in a form of administrative organization and when that form was changed, my property interest was thereby revoked. Such a ruling does not merely exalt form over substance, but it is directly contrary to this Court's edicts in both *Roth* and *Perry, supra*. The use of that principle by the courts nullifies the principles set out in those decisions.

II. THE DECISION OF THE COURT OF APPEALS SO FAR DEPARTED FROM THE RULES GOVERNING SUMMARY JUDGMENTS AS TO CALL FOR EXERCISE OF THE SUPERVISORY POWERS OF THE HIGH COURT.

A. The Majority of the Court of Appeals Decided Material Issues of Fact That it was Obligated to Return to the Trial Court for Adjudication and Thereby Denied Petitioner Due Process of Law.

As I have come to understand the rules governing such proceedings, summary judgment may be granted only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Federal Rules of Civil Procedure, Rule 56.) Also, the party opposing summary judgment has the burden of demonstrating material issues of fact. For the court majority to award summary judgment in accordance with the law, it had to find that the record showed no material factual dispute in the case.

Here I did my part. The record contains substantial credible evidence of the existence of a mutual and explicit agreement between the University and me regarding my

participation in the computer science program. (See Borges Declaration, App., *infra*, 10a—12a) The existence of this agreement was the basis for the Judge Reinhardt's dissent. (App., *infra*, 7a—8a) The record further shows Respondents' efforts to dispute the terms and conditions of that agreement. (e.g., Brief for Appellees, at 26) Thus, the questions of (1) whether the agreement implicitly guaranteed me a transfer to wherever the computer science program might be moved, or (2) whether the agreement guaranteed me a full professional environment in computer science regardless of where I am assigned, or (3) whether the agreement made with the Chancellor's appointed agent was binding on the Chancellor, or (4) whether the agreement was subsequently ratified by actions of the Chancellor in approving my leave to retrain, are all disputes arising from the testimonial and documentary evidence of the agreement (Borges Declaration, *supra*, and Appellant's Excerpts of the Record, tab 7). Unless I misunderstand the language of Rule 56, *supra*, these are all "genuine issues of material fact" inhering in the case.

Certainly, that was the conclusion of Judge Reinhardt who wrote in his dissent:

> According to the Borges affidavit, which we must take as true for summary judgment purposes, Milton had an agreement with the Chairman of the Mathematics Department. Under this agreement, Milton would retrain himself as a computer scientist and thereby give up his previous specialization in functional analysis. In return, Chairman Borges promised that Milton would receive a "full professional environment for computer science." If this promise was binding, it was a sufficient "mutually explicit understanding[]" to create a property interest. Perry v. Sindermann, 408 U.S. 593, 601 (1972). On the present record, there is a factual dispute regarding whether the Mathematics Department Chairman had the authority to bind the University by making such a promise. The university regulations are ambiguous on this issue. Because the Computer Science Division was to be created, at least in part, out of the Mathematics Department, and because the Division would be the only arm of the University where Milton could have a "full professional environment for computer science," I

believe that there is a genuine issue of material fact whether the Chairman of the Mathematics Department had the authority to bind the University by his promise. (App., *infra*, 7a—8a).

And unless I have further misunderstood the rules governing summary judgments, due process requires that all such issues must be decided by a trier of fact. Yet, instead of following the rules and remanding these issues for trial, the majority of the Court of Appeals summarily *decided* them in favor of the moving party: The majority stated:

> At most the oral agreement provided Milton with an expected benefit from the Mathematics Department only. Without any evidence that would bind the entire University to the Borges agreement, Milton has no more than a unilateral expectation of a full professional environment in the Division of Computer Science. (App., *infra*, 5a)

Thus, an appellate court concludes as fact that the agreement did not confer any claim to the benefit of a full professional environment outside of the Department of Mathematics. That is both an interpretation and adjudication of the intent and scope of the agreement without benefit of witnesses, testimony, examination or cross examination. The Court further concludes as fact that the agreement gave me no more than a unilateral expectation of a benefit. That is likewise a factual adjudication uninformed by witnesses, testimony, etc. In rendering these findings it appears to me that the majority of the Court of Appeals took unto itself the functions of the trial court but dispensed with the evidentiary procedures that define a trial. In so doing, the Court summarily deprived me of my right to due process of law.

B. The Majority of the Court of Appeal Improperly Applied the Statue of Limitations by Using a Non-event to Trigger the Running of the Statute of Limitations.

That this matter is not time barred was stated succinctly by Judge Reinhardt in his dissent:

"I also disagree with my colleagues that the statute of limitations bars Milton's claim. Because the cause of action arose less than two years before the Supreme Court's decision in Wilson v. Garcia, 471 U.S. 261, 279 (1985), the statute of limitations period ended on April 17, 1986, one year after Wilson was filed. See Usher v. Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). However, Milton's pursuit of administrative and state court remedies tolled the statute for almost all of the period leading to the filing of this action. His second administrative grievance (which was filed within the original limitations period on January 16, 1986) tolled the statute at least until January 15, 1989. His state court suit further tolled the statute until September 7, 1990. The present case was filed less than two months later, on August 19, 1990." (App., *infra*, 8a)

The majority of the Court of Appeals seized upon August 2, 1998, as the date the one-year statute should begin to run. It was on this date that an advisory committee with no power to render a binding decision (the Committee on Privilege and Tenure, or CPT) made a report to the Chancellor. CPT is an interim, advisory committee in the internal grievance process and has no authority whatsoever to make any decisions or implement any resolution of the matter, and this was clearly on the record. Indeed, the report itself is clearly advisory, with recommendations to the final decision maker, the Chancellor (Cartwright Declaration, CR. 36, Exhibit A). It is difficult to believe that there is a legal basis for commencing the run of a statute of limitations before the person with the authority to make the decision, in this case the Chancellor of the University, did so, and the majority cited none. The Committee on Privilege and Tenure has only the ability to recommend to the Chancellor and no authority whatsoever to make or implement any decisions in grievance matters. The Chancellor's final decision came well after this date and well within the time the statute was tolled, as Judge Reinhardt noted.

In summary, by deciding crucial issues that are the purview of the trier of fact and using a non-event to trigger the commencement of the statute of limitations, the majority of the Court of Appeals grossly departed from the rules for

summary judgment and precluded Petitioner from his receiving due process rights in a court of law. These actions are such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of the supervisory and corrective powers of this High Court.

III. THE QUESTIONS PRESENTED BY THIS CASE ARE IMPORTANT AND SHOULD COMPEL A REVIEW BY THE SUPREME COURT OF THE UNITED STATES.

The Court of Appeals' departure from the rules of summary judgment and its formulation of a new principle governing formation of property interests in university employment is not a harmless exercise of judicial adventurism. At the purely individual level, this ruing implicates significant property issues reflected in the fact that if my situation remains unremedied I will have lost at least $800,000 through age 75 in salary , support funds, and reduced retirement benefits. That is not a trivial loss. No citizen of the United States should be obliged to surrender a claim to such property without due process of law.

However, the scope and impact of the decision of the Court of Appeals goes far beyond my personal loss. Irrespective of the Court of Appeals' declination to publish its opinion, its affirmation of the District Court's ruling on summary judgment creates a de facto precedent that will be fully exploited in the university environment. If the High Court does not negate this case, it will be trumpeted by the University Administration as a victory and an approval of its actions. Thereafter, this Petitioner will not be the last UC Davis professor to be deprived of property, liberty, and academic freedom without due process.

Suppose, for example, that the UC Davis Administration should decide to relocate all of the courses and curricula in mathematics from the College of Letters and Science to the School of Engineering. By the ruling of the Court of Appeals, only faculty who have evidence that they were expressly promised a transfer in the event their discipline were relocated to some other administrative home on the campus would have a protected property/liberty interest in continued employment in that discipline. (It can be safely

assumed that no faculty member in the Department of Mathematics, indeed, probably in the entire University, has ever asked for or been given such a promise.) By the ruling of the Court of Appeals, therefore, none of the L&S Mathematics faculty would have any property or liberty interest in their continued teaching of mathematics and, without any due process, could be denied transfers to the School of Engineering and further denied the right to continue to teach mathematics in the College of Letters and Science. Thereafter, the Administration could hire all new faculty—or selectively transfer some of the old faculty—for the newly-relocated program leaving all of those not transferred without courses to teach. A tenured professor or a group of tenured professors with nothing to teach would readily become the targets of termination for "good cause;" i.e., that there is no longer any need for their services, and thereby a Court-sanctioned mechanism could be employed to render meaningless tenure itself.

Furthermore, a variant of the same scheme could produce the same result without relocating a single course. Suppose that the Administration decided to change the name of the present discipline from "computer science" to "information science" and none of the faculty currently assigned to "computer science" had an express agreement that they would still be able to participate in the program in the event its name were ever to be changed. By the principle laid down by the Court of Appeals for the Ninth Circuit , would not the Administration be legally allowed to prohibit all faculty now in "computer science" from continuing to teach in the same discipline, newly renamed "information science," because they had no express agreements that their rights to that participation would survive a name change? Is that not the exact the nature of the action taken against me, which has been fully sanctioned by the Court of Appeals' decision?

A full application of this type of mechanism by university administrators has great potential for completely undercutting the principles enunciated in *Perry*, *supra*, and the construct of tenure. The principle that is established by the court here sidesteps the rights to property established in Supreme Court cases and essentially vitiates the value of tenure in any circumstances in which an administrator can come up with a

reorganization. Universities cannot be allowed to abolish the tenure system by this sort of a back door. To allow such a maneuver flaunts the law and flaunts the tenure system. It is difficult to imagine a mechanism better contrived and with greater potential for invidious discrimination against a professor for reasons that could never survive the anvil of due process than this one. It is difficult to imagine a mechanism better contrived and with greater potential to induce a climate of intimidation on university campuses and wholly eviscerate the purposes and protections of tenure than this one. And yet it is precisely this mechanism and this potential for abuse that the Court of Appeals has sanctioned by its ruling.

Administrative cultures among large universities are remarkably similar and their lines of communication remarkably swift. If not stifled in its infancy, this bureaucratic scheme that has been used to deprive one fully competent professor of his deserved property, his right to teach, and his ability to conduct research in his field is destined to become a model for administrative abuse elsewhere. University faculty are not reputed for their boldness, and the mere possibility of suffering the privations visited upon this Petitioner is more than enough to create a suffocating climate of intimidation on university campuses.

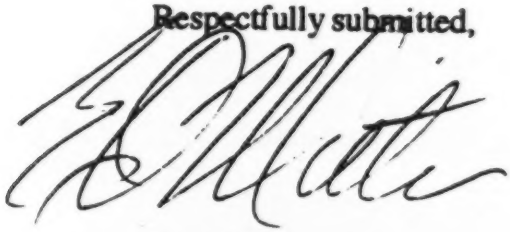
Finally, I note that only a few years ago a unanimous United States Supreme Court removed the shroud of secrecy in which administrators have traditionally cloaked their personnel decisions, holding that universities have no privilege to withhold information relative to such decisions from discovery in federal courts. *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182 (1990). A particularly frustrating irony of my case is that, pursuant to that ruling, I discovered substantial information supporting the merits of my cause of action but was foreclosed from presenting it to a trier of fact by the summary judgment. It would be a mockery of the Constitution of the United States if the casual use of the summary judgment now emerges as the functional equivalent of the privilege that this Honorable Court rejected in *University of Pennsylvania*, *supra*.

CONCLUSION

By affirming summary judgment, the Court of Appeals grossly departed from the accepted and usual course of judicial proceedings and, in the world of the university, gives the imprimatur of legality to a scheme by which tenure itself could be terminated without due process. This decision constitutes a pernicious and dangerous negation of the rulings of this Honorable Court in *Perry* and *Roth*. The action of the Court of Appeals, regardless of whether it can be cited in legal scholarship, legitimizes a blueprint for eradicating the rights of faculty and instilling conformity and stagnation in the empirical reality of university management. If left in place, it gives a state bureaucracy a license for invidious discrimination and selective punishment without the Constitutional protection of due process. This High Court should review and reverse this decision before its destabilizing effect on the university environment spreads.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



E.O. Milton
2406 Rivendell Lane
Davis, CA 95616
(916) 756-2753

Appearing PRO SE

December 20, 1994

APPENDIX A. Decision of United States Court of Appeals for the Ninth Circuit on Petition for Rehearing. Filed September 22, 1994.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

E.O. MILTON,

Plaintiff-Appellant,

No. 92-15400

D.C. No. CV 90-01306-EJG

v.

ORDER

THEODORE L. HULLAR; PETER LINZ; NORMAN MATLOFF; ROBERT CELLO; RALPH ALGAZI; RAY KRONE; RICHARD WALTERS; MANFRED RUSCHITZKA; CAROL CARTWRIGHT; KEN JOY; LARRY VANDERHOFF,

Defendants-Appellees.

Before: REINHARDT and LEAVY, Circuit Judges, and MERHIGE,*** Senior District Judge.

Judges Leavy and Merhige have voted to deny the petition for rehearing, and Judge Reinhardt has voted to grant. Judges Reinhardt and Leavy have voted to reject the suggestion for rehearing en banc, and Judge Merhige has so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

*** The Honorable Robert R. Merhige, Jr., Senior District Judge for the Eastern District of Virginia, sitting by designation.

APPENDIX B. Decision of Ninth Circuit Court of Appeals. Filed July 11, 1994.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 92-15400
CT/AG#: CV-90-0130

E. 0. MILTON

Plaintiff - Appellant

v.

THEODORE L. HULLAR; PETER LINZ; NORMAN MATLOFF; ROBERT CELLO; RALPH ALGAZI; RAY KRONE; RICHARD WALTERS; MANFRED RUSCHITZKA; CAROL CARTWRIGTH; KEN JOY; LARRY VANDERHOFF

Defendants - Appellees

APPEAL FROM the United States District Court for the Eastern District of California (Sacramento).

THIS CAUSE came on to be heard on the Transcript of the Record from The United States District Court for the Eastern District of California (Sacramento) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court iii this cause be, and hereby is AFFIRMED.

Filed and entered July 11, 1994.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

E.O. MILTON,

Plaintiff-Appellant,

v.

No. 92-15400

D.C. No. CV 90-01306-EJG

MEMORANDUM*

THEODORE L. HULLAR; PETER LINZ; NORMAN MATLOFF; ROBERT CELLO; RALPH ALGAZI; RAY KRONE; RICHARD WALTERS; MANFRED RUSCHITZKA; CAROL CARTWRIGHT; KEN JOY; LARRY VANDERHOFF

Defendants - Appellees

Appeal from the United States District Court
for the Eastern District of California
Edward J. Garcia, District Judge, Presiding

Submitted August 10, 1993**
San Francisco, California

Before: REINHARDT and LEAVY, Circuit Judges, and MERHIGE,*** Senior District Judge.

E.O. Milton appeals the district court's grant of summary judgment in favor of the appellees, members of the faculty and administration at the University of California at Davis. Milton filed an action against the appellees in their

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for submission on the record and briefed and without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

*** The Honorable Robert R. Merhige, Jr., Senior District Judge for the Eastern District of Virginia, sitting by designation.

individual capacities pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment, alleging that his federal constitutional rights were violated when he was not appointed to the faculty of the new Division of Computer Science at Davis. In his complaint, Milton, alleged:

> [T]he Math Department entered into a verbal agreement with plaintiff Milton by which it would provide plaintiff Milton the appropriate leaves from his teaching responsibilities (in order that plaintiff Milton could retrain himself as a computer scientist), and thereafter a full professional environment as a computer scientist in exchange for plaintiff Milton retraining himself as a computer scientist.

Complaint and Demand for Jury Trial, No. CIV-S-90-1306EJG, at 4, para. 16. Milton further alleges that "[t]his agreement was known of, and approved by, the administration of the University of California, Davis." Id. As a result, Milton claims his protected liberty and property interests were violated when he was not appointed to a faculty position at the Division of Computer Science. Milton also claims that there were procedural irregularities during the appointment process that excluded him from the professional environment he was promised.

We may affirm the district court "on any grounds fairly supported by the record." Lee v. United States, 809 F.2d 1406, 1408 (9th Cir. 1987), cert. denied, 484 U.S. 1041 (1988).

A. Property Interest

"A protected property interest exists if there is a 'legitimate claim of entitlement' to a specific benefit." Goodisman v. Lytle, 724 F.2d 818, 820 (9th Cir. 1984) (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)). "A subjective expectancy creates no constitutionally protected interest." Id. In short, there must be more than a "unilateral expectation" in a benefit. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

Milton's claimed property interest stems from an oral agreement he had with Carlos Borges, the Chairman of the

Mathematics Department at Davis from 1980 through 1984. Professor Borges describes the agreement:

> I told Professor Milton of the Department's desire to have in its ranks a competent computer scientist, and Professor Milton told me of his willingness to retrain himself as a computer scientist if the Mathematics Department would support him in this new area. In fact, we explicitly and unequivocally agreed that Professor Milton could have the appropriate leaves from his teaching responsibilities within the Mathematics Department to retrain himself as a computer scientist, and thereafter, he would be provided a full professional environment within which to be a computer scientist.
>
> Professor Milton kept his promise with the Department . . . and the Mathematics Department's obligation for its half of the bargain was also without question . . . . What I had intended, and what Professor Milton understood, was that the Mathematics Department would provide Professor Milton from the fall of 1982 a full professional environment for computer science . . . .
>
> Unfortunately, while the Mathematics Department was fully prepared to live up to its part of the bargain with Professor Milton, events on the campus at large caused the Mathematics Department to be unable to meet its commitment to Professor Milton. In particular, in 1983, the Division of Computer Science was created . . . and the Mathematics Department was substantially stripped of any ability to provide Professor Milton with what he had bargained.

Declaration of Carlos Borges in support of Plaintiff's Opposition to Motion for Summary Judgment, No. CIV-S-90-1306EJG, at 1-3, paras. 2-4 (emphasis added). At most the oral agreement provided Milton with an expected benefit from the Mathematics Department only. Without any evidence that would bind the entire University to the Borges agreement, Milton has no more than a unilateral expectation of a full professional environment in the Division of Computer Science.

On appeal, Milton states: "My department chair, Carlos Borges, had express authority to operate Department programs, make commitments to new and existing faculty members . . . in mathematics and in the newly certified . . . computer science program." Appellant's Opening Brief at 6 (emphasis added). We find no support for this statement in the record, and Milton cites none. The Department Chair's authority simply does not extend that far. See Appellant's Supplemental Excerpts of Record (describing duties of department chairs as exclusive to their departments). Conclusory allegations like these are insufficient to defeat a motion for summary judgment. First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, (1968); Shane v. Greyhound Lines, Inc., 868 F.2d 1057, 1061 (9th Cir. 1989). Milton also contends he had a "bilateral agreement" with the defendants that was the basis of his "expectation that I would be permitted to continue my employment at [Davis] as a computer scientist." Appellant's Opening Brief at 16. He claims to have a "mutual written agreement and approval of the University," id. at 6, to have a professional environment in computer science. Milton presents documents that he contends show a mutual agreement. See Excerpt of Record, tab 7. These documents do not support a mutual agreement; rather, they show an apparently routine request for, and grant of, a sabbatical. Professor Milton's Sabbatical Leave statement does not even mention the agreement with the Math Department as the reason for his application for sabbatical.[1] Moreover, because Davis has published standards for granting faculty appointments, no oral agreement between Milton and Borges could establish a binding contract guaranteeing Milton a faculty appointment in another department. See Davis v. Oregon State Univ., 591 F.2d 493, 496 (9th Cir. 1978).[2]

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[1] The request merely states that Milton "plan[s] to spend my sabbatical leave developing my research interests in computer science" and that Milton has "identified several possible areas in which I might like to work," including the relational model of database systems, the interface between holography and optical computation as it relates to digital computing, and operational system independence and parallel processing languages.

[2] In addition to other problems with this case, the statute of limitations has run on the contract claim. On August 2, 1988, the Committee on Privilege and Tenure found that there was no contract with the University

B. Liberty Interest

Milton has no liberty interest in transferring to the Department of Computer Science or in having Davis follow the proper procedures in creating and staffing the Division. See Roth, 408 U.S. at 572-74 (defining liberty interests).

C. Procedural Due Process

Milton argues that he has a constitutionally protected interest in having Davis follow the proper procedures in creating and staffing the Division of Computer Science. However, "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." Roth, 408 U.S. at 569. Because there are no protectable liberty or property interests at stake, there is no due process violation.

AFFIRMED.

Milton v. Hullar, No. 92-15400

REINHARDT, Circuit Judge, dissenting:

I dissent. As I read the record, there is a genuine issue of fact regarding whether Milton had a property interest in having a "full professional environment" to teach and research as a computer scientist. According to the Borges affidavit, which we must take as true for summary judgment purposes, Milton had an agreement with the Chairman of the Mathematics Department. Under this agreement, Milton would retrain himself as a computer scientist and thereby give up his previous specialization in functional analysis. In return, Chairman Borges promised that Milton would receive a "full professional environment for computer science." if this

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in the events surrounding the approval of the sabbatical. Appellees, Supplemental Excerpt of Record, tab 36, Exh. A, at 9. Nothing happened within the next year to toll the statute of limitations on this claim. Milton's action based on section 1983 was not filed until October of 1990. Certainly, any action Milton may have had against the Mathematics Department is time barred.

promise was binding, it was a sufficient ,'mutually explicit understanding[]" to create a property interest. Perry v. Sindermann, 408 U.S. 593, 601 (1972). On the present record, there is a factual dispute regarding whether the Mathematics Department Chairman had the authority to bind the University by making such a promise. The university regulations are ambiguous on this issue. Because the Computer Science Division was to be created, at least in part, out of the Mathematics Department, and because the Division would be the only arm of the University where Milton could have a "full professional environment for computer science," I believe that there is a genuine issue of material fact whether the Chairman of the Mathematics Department had the authority to bind the University by his promise.

I also disagree with my colleagues that the statute of limitations bars Milton's claim. Because the cause of action arose less than two years before the Supreme Court's decision in Wilson v. Garcia, 471 U.S. 261, 279 (1985), the statute of limitation period ended on April 17, 1986, one year after Wilson was filed. See usher v. Los Angeles, 828 F.2d 556, 561 (.9th Cir. 1987). However, Milton's pursuit of administrative and state court remedies tolled the statute for almost all of the period leading to the filing of this action. His second administrative grievance (which was filed within the original limitations period on January 16, 1986) tolled the statute at least until January 15, 1989. His state court suit further tolled the statute until September 7, 1990. The present case was filed less than two months later, on August 19, 1990.

APPENDIX C. Order of the United States District Court for the Eastern District of California. Filed January 30, 1992.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

E. O. MILTON,

Plaintiff,

v.

THEODORE L. HULLAR, et. al.

Defendants.

CIV. NO. S-90-1306 EJG/JFM
ORDER AFTER HEARING
DATE: JAN 30, 1992

This matter was before the court on January 27, 1992 for hearing on defendants' motion for summary judgment, defendants' request for judicial notice and defendants' various evidentiary objections and request to strike plaintiffs' declarations. Richard Fathy appeared on behalf of plaintiff. Jeffrey Blair appeared on behalf of defendants. After considering the parties' written and oral arguments and the record in this matter, and for the reasons stated in the court's oral analysis in open court on the record, the court entered the following order.

IT IS HEREBY ORDERED that defendants' request for judicial notice is granted as to the documents submitted by defendants and denied as to the documents not provided to the court. Defendants' motion for summary judgment is granted. The clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

Dated: 1/27/92

EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D. Declaration of Carlos Borges.

RICHARD G. FATHY (SB #53502)
LAW OFFICES OF RICHARD G. FATHY
A Professional Corporation
555 Capitol Mall, Suite 250, Sacramento, CA 95814
916/441-4405
Attorney for Plaintiff E. O. MILTON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CASE NO. CIV-S-90-1306EJG JFM

E. O. MILTON,

Plaintiff,

v.

THEODORE L. HULLAR; PETER LINZ; NORMAN MATLOFF; ROBERT CELLO; RALPH ALGAZI; RAY KRONE; RICHARD WALTERS; MANFRED RUSCHITZKA; CAROL CARTWRIGHT; KEN JOY; LARRY VANDERHOEF

Defendants.

DECLARATION OF CARLOS BORGES IN SUPPORT OF PLAINTIFF'S OPPOSITION TO NOTION FOR SUMMARY JUDGMENT

DATE: 9/27/91
TIME: 9:00 A.M.
COURTROOM: 4

I, Carlos Borges, declare that if I were sworn as a witness, I would testify as follows:

1. I am a full Professor of Mathematics, and have been in the Mathematics Department at the University of California,

Davis, for over twenty years. I served as the Chairman of the Mathematics Department at UCD from 1980 through 1984.

2. While Chairman of the Mathematics Department in the early 198019, 1 told Professor Milton of the Department's desire to have in its ranks a competent computer scientist, and Professor Milton told me of his willingness to retrain himself as a computer Scientist if the Mathematics Department would-support him in this new area. in fact, we explicitly and unequivocally agreed that Professor Milton could have the appropriate leaves from his teaching responsibilities within the Mathematics Department to retrain himself as a computer scientist, and thereafter, he would be provided a full professional environment within which to be a computer scientist.

3. Professor Milton kept his promise with the Department (i.e., he retrained himself to competently teach and pursue research in computer science) and by the fall of 1982, he was teaching a full load of courses within the Mathematics Department solely devoted to computer Science. His competence in this area was without question, and the Mathematics Department's for its half of the bargain was also without question--namely, it was to provide him an environment within which to proceed as a computer scientist. What I had intended, and what Professor Milton understood, was that the Mathematics Department would provide professor Milton from the fall of 1982 a full professional environment for computer science, including but not limited to, adequate funds for equipment; access to research assistants; access to teaching assistants; the opportunity to participate in formulating a policy for computer science; the opportunity to participate in the hiring of other computer scientists; the opportunity to participate in the formulation of course work in computer science on both the undergraduate and graduate levels; the opportunity to be evaluated by other computer scientist; and an explicit title making clear that Professor Milton's area of expertise was not simply Mathematics generally, but in computer science in particular.

4. Unfortunately, while the Mathematics Department was fully prepared to live up to its part of the bargain with professor Milton, events on the campus at large caused the Mathematics Department to be unable to meet its commitment to Professor Milton. in particular, in 1983, the Division of

Computer science was created in such an unfair and hurried fashion that Professor Milton was excluded from the Division, and the Mathematics Department was substantially stripped of any ability to provide Professor Milton with what he had bargained.

5. To this date, Professor Milton has, in the face of an unsupportive working environment, maintained and enhanced his competence as a computer scientist, however, the Math Department has been substantially unable to provide Professor Milton with any of the critical ingredients that would be supportive of his work in computer science, viz., those items noted in paragraph three above.

6. I am personally familiar with members of the Division of Computer Science, and have been told unequivocally by members of that Division that Professor Milton will not be approved for a professorship by the Division because of the personal animus towards Professor Milton that exists in the minds of various members of the Division. For example, Manfred Ruschitzka specifically told me in April 1983, that he opposed Professor Milton's membership in the new unit in computer science because the seven members of the in-group have good rapport and want to ensure that their comradeship is not disrupted. Furthermore, Peter Linz specifically told me on two different occasions in 1983 that admitting Professor Milton to the Division of Computer Science (1) would be disastrous, and (2) would-never happen. Furthermore, Ralph Algazi agreed with me in July 1983 when I pointed out that the qualifications of Professor Milton were the same as the qualifications of Manfred Ruschitzka, an insider who would be permitted into the Division. Finally, Ralph Algazi specifically told me in September 1983 that Professor Milton would not be permitted to teach computer science courses outside the Division of Computer Science because he wanted "no contamination of his new unit." It appears to me to be a foregone conclusion that the Division has a long-standing, vitriolic dislike of Professor Milton, and has not objectively assessed his professional capabilities.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 30th day of August, 1991, in Davis, California.

CARLOS BORGES